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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

DAVID SIMON,

Plaintiff and Appellant,

v.

ROBERT EROEN et al.,

Defendants and Respondents.

B208692

(Los Angeles County  
Super. Ct. No. BC295297)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest Hiroshige, Judge. Affirmed.

Law Office of Christie Gaumer and Christie Gaumer for Plaintiff and Appellant.

Meyers McConnell, John W. McConnell, III, Berta A. Blen; Bowman and Brooke and Renee S. Konigsberg for Defendants and Respondents.

David Simon (appellant) appeals from the order of the superior court dismissing his legal malpractice action against his former attorneys Robert Eroen, Jill Rosenthal Eroen, and their former law firm, Eroen & Eroen (collectively referred to as respondents). We affirm the judgment (order dismissing the second amended complaint).

## **FACTUAL AND LEGAL BACKGROUND**

Appellant is the son of Ernst Simon and Helga Brasch Simon.<sup>1</sup> Ernst owned a tax preparation business and David worked for Ernst as a tax preparer. Helga died on October 7, 1984. Helga's estate consisted of, inter alia, valuable rare stamp and coin collections, stocks, a "restitution fund" in Germany valued at approximately \$500,000, and community property interests in nine properties.

Ernst married Adelle Wiseley Simon in 1989. In 1997, Ernst suffered a massive stroke.

In 1998, appellant filed a civil action (case No. BC185045, *Simon v. Wiseley et al.*, hereinafter the 1998 Civil Action) against Ernst and Adelle, alleging breach of contract and quantum meruit. During discovery, appellant learned of a holographic will dated January 13, 1983 (the 1983 Will), in which Helga left David 49 percent of her community property and certain personal property. Appellant amended his complaint to assert claims based on the will. Ernst claimed that the 1983 Will was the last will in his possession. However, appellant testified at his deposition that he had discussed a later will with Helga in March 1984 (the 1984 Will). Appellant said he gave that will to Ernst without keeping a copy.

Appellant then filed a petition to probate Helga's 1983 Will (case No. BP053483, the 1983 Probate Case). He amended the complaint in the 1998 Civil Action to allege

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<sup>1</sup>

Since there are several parties other than appellant with the surname of Simon, we refer to each of them by first name with no disrespect intended.

that Ernst and Adelle had intentionally destroyed Helga's original 1983 Will and "possibly other original wills."

For the next 10 years, appellant pursued several legal proceedings relating to Helga's and Ernst's property. The pertinent legal history is as follows.

In November 1998, on the day trial was set to commence in the 1998 Civil Action, the judge ordered the parties to mediate the matter. The parties agreed to settle the case on the record, and a written settlement agreement was executed (the 1998 Settlement Agreement), which provided, in part, that: "2. On November 3, 1998, Plaintiff and Defendants settled their disputes on the record in open court, in Department 42, The Honorable Sherman W. Smith, Jr., presiding. The Court accepted the settlement agreement after having made an inquiry of the parties as to their understanding of the agreement. The Court ordered counsel for the parties to prepare a written settlement agreement consistent with what was articulated on the record. . . . [¶] [T]he parties hereby agree as follows: [¶] . . . [¶] (i) The pending probate action will be dismissed along with this civil action. [¶] (j) The parties agree not to sue each other, with the exception of (1) breach of this agreement and/or (b) [*sic*] future conduct of the parties which would give rise to a cause of action." Accordingly, the 1983 Probate Case was withdrawn on March 5, 1999, and the 1998 Civil Action was dismissed with prejudice on August 1, 2000.

In June 2001, while working in an office he had once shared with Ernst, David found a copy of the 1984 Will. The 1984 Will granted appellant a remainder interest in the real properties after Ernst's death. Appellant consulted with respondents regarding the 1984 Will and asked them to represent him. In November 2001, respondents filed a petition on appellant's behalf to probate the 1984 Will (*In re Estate of Helga Brasch Simon*, case No. BP070524, the 1984 Probate Case). Respondents took no further action on the case. In 2002, they wrote appellant, advised him they could not continue to represent him because of outstanding bills, and requested that he pick up his files.

In 2002, appellant, represented by different counsel, filed a conservatorship action against Ernst (case No. LP008641, the Conservatorship Action), and a companion civil

action against Ernst, Adelle, and others (case No. BC284614, the Van Nuys Action). The Van Nuys Action sought to recover real and personal property sold by Adelle. In addition to Ernst and Adelle, appellant named the third party purchasers of some of the parcels of real property and the realtors involved in the transactions as defendants. The suit contained causes of action seeking rescission of the 1998 Settlement Agreement and enforcement of appellant's inheritance rights under the 1984 Will and the Conservatorship Action.

In May 2003, appellant, represented by Christine Gaumer (counsel on this appeal), filed this action (*Simon v. Eroen*, case No. BC295297, the Malpractice Action) against respondents.

In 2005, appellant moved to stay the trial in the Malpractice Action until the probate court made a ruling in the 1984 Probate Case. The parties to this action entered into a stipulation and stay order (the 2005 Stipulation) in which appellant agreed to dismiss the Malpractice Action with prejudice "should the Probate Court rule that Helga Brasch Simon's 1984 Will cannot be admitted to probate."

Respondents, appearing as objectors, subsequently filed a motion for summary judgment in the 1984 Probate Case, arguing that the action was barred by the 1998 Settlement Agreement. The probate court granted summary judgment against appellant in July 2006, and appellant appealed.

On July 18, 2007, Division Five of this district affirmed the judgment resulting from the order granting summary judgment in the 1984 Probate Case in a nonpublished opinion (the Division Five opinion). The Supreme Court denied appellant's petition for review in October 2007.

On December 28, 2007, respondents filed a motion to dismiss the Malpractice Action. On April 15, 2008, the matter came on for hearing, the motion to dismiss was

granted, and the complaint was dismissed with prejudice.<sup>2</sup> The trial court's ruling stated, inter alia, "As the Probate Court has resolved any concern it may have had with the issue of rescission of the 1998 settlement agreement, this Court finds that all conditions have been met to dismiss this action under Paragraph 4.C. of the [2005 Stipulation]. A final judgment has been rendered in the probate matter, and accordingly, the Court's basis for refraining from dismissing this action is now eliminated."

## **DISCUSSION**

Appellant contends that the trial court erred in dismissing the action because the 2005 Stipulation was broadly worded to allow him to pursue all of his underlying rights under the 1984 Will to conclusion. He points out that the Van Nuys action, which seeks to rescind the 1998 Settlement Agreement, is still pending. Appellant argues that if he is able to set aside the agreement, he will no longer be barred from submitting the 1984 Will to probate. Thus, he asserts he has not had a final determination on his right to probate the will.

Assuming that to be the case, appellant ignores the clear language of the 2005 Stipulation. It states in pertinent part: "The Parties stipulate and agree that should the Probate Court rule that Helga Brasch Simon's 1984 Will cannot be admitted to probate, that Plaintiff David Simon will forthwith dismiss this action, with prejudice ('this action' means BC295297)." The 2005 Stipulation does not say the action will be dismissed when appellant has concluded all proceedings relating to Helga's 1984 will. Appellant agreed to dismiss the case when the court determined that he could not probate the 1984 Will. That condition has been met.

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<sup>2</sup>

Respondents' request for attorney fees was denied, but their request for expert witness fees was granted in the same ruling.

Appellant had his day in court to determine whether the 1984 Will should be admitted to probate. Judgment was entered against appellant in the 1984 case, and it was upheld on appeal. The Division Five opinion held that when appellant entered into the 1998 Settlement Agreement, he agreed that all issues as to his rights under Helga's will or wills were resolved therein.<sup>3</sup> Thus, the probate court's decision not to admit the 1984 Will to probate bars appellant's attempt to further litigate the Malpractice Action. (*Daar & Newman v. VRL International* (2005) 129 Cal.App.4th 482, 488-489.)

Appellant seeks to avoid this conclusion by claiming that the parties intended to stay the Malpractice Action until the validity of the 1998 Settlement Agreement was determined. However, the Van Nuys action seeking rescission of the settlement was filed prior to the signing of the 2005 Stipulation and appellant could have made it clear that he would not dismiss the Malpractice Action until the Van Nuys action was fully adjudicated. He did not do so. Appellant cannot now disavow the terms of the 2005 Stipulation. (*Country Eggs, Inc. v. Kawamura* (2005) 129 Cal.App.4th 589, 595.)

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<sup>3</sup> The Division Five opinion stated: "In the prior civil action and pursuant to the petition to probate the 1983 Will, [appellant] sought to recover his interest in Helga's estate. The injury addressed was Ernst's failure to distribute property pursuant to Helga's express testamentary wishes. [Appellant]'s verified first amended complaint in the underlying civil action admitted three pertinent facts. [Appellant] was aware Helga had or may have drafted other wills more favorable to him than the 1983 will. Those wills were in Ernst's possession. And Ernst and Adelle had intentionally destroyed Helga's 1983 will and may have done the same with respect to other original wills. [Appellant] cannot avoid those judicial admissions. [Citations.] Further, the parties did not state that the settlement was premised on the 1983 will. Rather the 'global settlement' expressly resolved 'all issues' as to [appellant's] property rights under Helga's will or wills."

## **DISPOSITION**

The judgment (order dismissing the complaint) is affirmed. Respondents shall recover their costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

MANELLA, J.